No. 08-1054

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In The
Supreme Court of the United States

MILLICENT Y. HODGE,
Petitioner,

v.

SUNOCO, INC. (R&M)
and NAVY YARD SUNOCO, INC.,
Respondents.

On Petition for Writ of Certiorari to the District of Columbia Court of Appeals

BRIEF IN OPPOSITION

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March 23, 2009

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QUESTIONS PRESENTED

1. Was the decision of the District of Columbia Court of Appeals correct when it found that Petitioner's Notice of Appeal was untimely filed because it was filed over four months after the jury verdict was entered and over three months after the denial of plaintiff's first motion for a new trial?

2. Was the District of Columbia Court of Appeals correct in dismissing the Petitioner's appeal not only because it was untimely but also because it sought to appeal the first order denying Petitioner's motion for a new trial which is not an appealable order?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

There are no parties to the proceedings other than those listed on the caption.

Pursuant to Supreme Court Rule 29.6, Respondents Sunoco, Inc., and Navy Yard Sunoco, Inc. make the following disclosures:

Sunoco, Inc. owns 100% of respondent Sunoco, Inc. (R&M).

There is no parent or publicly held company owning 10% or more of the stock of Navy Yard Sunoco, Inc.

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STATEMENT OF THE CASE

The Petitioner, Millicent Hodge, asserted various claims against Sunoco, Inc. (R&M) and Navy Yard Sunoco, Inc. Petitioner's case revolves around an incident that occurred on July 27, 2005 involving a claim that petitioner's AC unit, which was repaired one week before the incident, failed. She returned to the Navy Yard Sunoco station and allegedly suffered from heat stroke and dehydration while at the premises of the Navy Yard Sunoco and while waiting inside her vehicle in the parking lot of the station.

The Trial of this matter was conducted from February 25, 2008, to February 27, 2008. The Jury returned a verdict on liability in favor of plaintiff and against defendant Navy Yard Sunoco. The Jury also awarded plaintiff $380.85 in damages.

The verdict was read in open Court on February 27, 2008 and the judgment from the Jury Trial was entered on the docket on March 6, 2008. (See Appendix annexed hereto at page 13b).

It is noteworthy that petitioner's Brief misidentifies the issue presented in the case. Specifically, the issue presented here involves a finding by the District of Columbia Court of Appeals which held that petitioner's Notice of Appeal was not timely filed within the thirty (30) day time period after entry of the judgment. See DC Ct. App. Rule 4(a).

Indeed, instead of presenting the actual issue in this case, petitioner misidentifies the issue and asks that the Court issue rulings on four denials of

petitioner's Motion for a New Trial, and not on the issue of the timeliness of her Notice of Appeal on the jury verdict and judgment which was entered March 6, 2008 on the docket.

As such, the arguments made by the petitioner, that this case involves the issue of what constitutes a final appealable order on the merits, is specious and without foundation. It also misstates the issues presented, and misstates the claim that there is a split among the circuits that is pertinent to the resolution of this case, which there clearly is not. Indeed, the law regarding the timeliness of filing the Notice of Claim as set forth infra shows that there are no proper issues presented for certiorari and that the Petition must be denied.

I. UNDERLYING ALLEGATIONS AND PROCEDURAL BACKGROUND

Petitioner made numerous allegations in connection with this case, and a number of those allegations were dismissed on summary judgment. In any event, the substance of the allegations are not relevant to this Appeal since the Appeal in the District of Columbia Court of Appeals was dismissed on procedural grounds as being untimely and on the grounds that it sought to Appeal a nonappealable Order, to wit, the denial of the initial Motion for a New Trial.

By way of procedural history, petitioner commenced this action by filing a Complaint for personal injury on September 1, 2005. Issue was joined by defendants

when they filed an Answer to the Complaint on September 23, 2005.

A three-day Jury Trial was held on February 25 – 27, 2008. On the Verdict Sheet, the Jury found liability in favor of petitioner and entered a judgment for $380.85 against Navy Yard Sunoco, Inc. (See Appendix at page 14b).

The judgment from the Jury Trial was entered on the Court docket on March 6, 2008. (See Appendix annexed at page 13b).

Petitioner filed a Motion to Set Aside the Verdict and for a Default Judgment, or, in the alternative, a Motion for a New Trial on March 19, 2008. The Court denied petitioner's Motion on March 25, 2008. (See Appendix at page 12b).

On April 2, 2008, petitioner filed a Second Motion to Set Aside the Verdict and for a Default Judgment, or, in the alternative, a Motion for a New Trial. The Court denied petitioner's Second Motion by Order dated April 22, 2008 signed by Judge Clarke. (See Appendix at page 9b).

The Court also issued an Order denying petitioner's Request for Leave to File a Reply in Support of Petitioner's Second Motion to Set Aside the Verdict and for Default Judgment on April 22, 2008. (See Appendix at page 9b).

On April 28, 2008, petitioner filed a Third Motion to Set Aside the Verdict and for a Default Judgment, or, in the alternative, Motion for a New Trial.

According to the docket, petitioner again filed this Third Motion on May 2, 2008. The Court denied petitioner's Third Motion on May 6, 2008. (See Appendix at page 8b).

On May 15, 2008, petitioner filed a Fourth Motion to Set Aside the Verdict and for a Default Judgment, or, in the alternative, Motion for a New Trial. (See Appendix at page 6b).

The Court denied petitioner's Third Motion to Set Aside the Verdict (which was re-filed previously) on May 16, 2008. (See Appendix at page 5b).

On June 16, 2008, the Court denied petitioner's Fourth Motion and noted that the Motion was untimely in that it was not filed within the ten-day time period, and that it did not cite any new or changed circumstances to persuade the Court to change its prior rulings. (See Appendix at page 2b).

Finally, on July 10, 2008, petitioner filed a Notice of Appeal. (See Appendix at page 1b).

The District of Columbia Court of Appeals issued an Order on consideration of the Notice of Appeal which was filed July 10, 2008. The Order directed that the appellant, Millicent Hodge, shall within twenty days show cause why the Appeal should not be dismissed as having been untimely filed because none of the appellant's Motions' to Reconsider tolled the time for an Appeal to the Court.

By Order dated September 15, 2008, the District of Columbia Court of Appeals found that to the extent

that the Appeal was taken from a judgment docketed on March 6, 2008, the Appeal was dismissed as untimely filed. The Court per curium Order that to the extent the Appeal was taken from the Order dated March 25, 2008, which denied appellant's Motion for Reconsideration, the Appeal was dismissed as both untimely and having been taken from a nonappealable Order.

The District of Columbia Court of Appeals was correct when it dismissed petitioner's Appeal and the dismissal of the Appeal does not fit any criteria for this Honorable Court granting certiorari. Specifically, it does not provide any novel issues of law nor does it remedy any split among the circuits that would warrant the Court's attention.

REASONS FOR DENYING THE WRIT

Petitioner in this case is attempting to inaccurately portray the case as one presenting a split among circuits, a way to streamline heavy dockets, and a method to unclog the Nation's Appellate Courts. In this case, however, nothing of the sort is presented and the Petition for Writ must be denied.

Contrary to petitioner's arguments, this case is a straightforward application of well settled rules relating to the timeliness of filing Appeals, and therefore, it provides no new or novel issue of law, no constitutional question, nor does it provide any split in the circuits which would otherwise warrant consideration from the Court.

Conspicuously absent from petitioner's Brief is the fact that she is really appealing the jury verdict rendered on February 27, 2008 and docketed on March 6, 2008. Since her Notice of Appeal was filed July 10, 2008, four months after the docketing of the jury verdict, it is clear that the District of Columbia Court of Appeals was correct in dismissing the Appeal as untimely.

Also conspicuously absent from petitioner's Brief is the fact that it is well settled under District of Columbia law that only a Motion to Reconsider or for a New Trial filed within ten days of the docketing of the judgment, tolls the running of the time for noting an Appeal (and then only until the Motion is acted upon). Coleman v. Lee Washington Hauling Co., 388 A.2d 44 (App. D.C. 1978); D.C. Court of Appeals Rule 4(a); Vincent v. Anderson, 621 A.2d 367 (App. D.C. 1993). In this case, even if petitioner's first Motion for a New Trial was filed within the ten-day period, the three subsequent Motions for a New Trial were not.

It is also noteworthy that the first Motion for a New Trial was denied March 25, 2008, over four months before petitioner filed the Notice of Appeal.

It is also well settled under District of Columbia law that a Motion for a New Trial under Rule 59 is a non-appealable Order and must be filed within ten days of the entry of the judgment being challenged; the ten-day limit is jurisdictional and the Trial Judge has no authority to decide the merits of such a Motion if it is untimely. In addition, where post-trial motions are filed by the party, but are not filed within the ten-day period as required, they are untimely and their filing

does not toll the running of the thirty-day time period for noting an Appeal. Circle Liquors, Inc. v. Cohen, 670 A.2d 381 (App. D.C. 1996); Words, Inc. v. Singer, 810 A.2d 910 (2002), cert. den'd, 541 U.S. 936, 124 S.Ct. 1659, 158 L.Ed.2d 357 (2004); D.C. Court of Appeals Rule 4(a)(4).

In this case, petitioner filed the Notice of Appeal well after the thirty-day time period elapsed after the denial of the first Motion for a New Trial. In addition, the three other Motions for a New Trial were filed well after the ten-day period for filing such Motions elapsed, and therefore, did not toll the running of the thirty-day time period. As such, petitioner's Notice of Appeal was untimely filed and the District of Columbia Court of Appeals correctly dismissed the Appeal as untimely.

Indeed, such a straightforward dismissal of a case does not warrant review by this Court and does not warrant the Court's time and attention.

In addition, the Court of Appeals for the District of Columbia also noted that petitioner was attempting to Appeal from a nonappealable Order; specifically, petitioner's attempt to Appeal the Order denying her first Motion to Reconsider, which was entered on March 25, 2008. The Court properly found that the Appeal of that Order denying petitioner's Motion for a New Trial and/or for Reconsideration was both untimely and attempted to take an Appeal from a nonappealable Order. It is clear from the D.C. Court of Appeals Rule 4 that if a party files a timely Motion for a New Trial within ten days, the time for filing a Notice of Appeal runs from the date that the Court

acts on the Motion, but the Order denying the Motion for a New Trial is a nonappealable Order. D.C. Court of Appeals Rule 4(a); Puckrein v. Jenkins, 884 A.2d 46 (App. D.C. 2005) (stating that standing alone, the denial of a Motion for Reconsideration is not an appealable Order).

In addition, it is noteworthy that District of Columbia Court of Appeals apparently issued the Order dismissing petitioner's Appeal on September 15, 2008 and according to the Supreme Court of the United States docket, petitioner filed their Petition for Writ of Certiorari on February 19, 2009, well after the ninety-day time period for which filing such a Petition is required. U.S. Supreme Court Rule 13. As such, petitioner's Petition for Writ of Certiorari is untimely and must be dismissed.

CONCLUSION

For the foregoing reasons, the respondent's respectfully submit that the Petition for Writ of Certiorari must be denied in all respects.

Respectfully submitted,

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